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Charles Seife, Professor
ARTHUR L. CARTER JOURNALISM INSTITUTE

TO: Cindy Cafaro
Office of the Executive Secretariat
Department of the Interior

FROM: Charles Seife
Professor, Journalism
New York University

RE: FR#2018-27561
Proposed rule re: FOIA

1 January, 2019

Dear Ms. Cafaro,

This is a public comment regarding FR#2018-27561, the Department of Interior's proposed rule regarding the agency's implementation of the Freedom of Information Act (FOIA), 43 CFR Part 2.

I am a professor of journalism at New York University and a working journalist who often uses FOIA in furtherance of his journalism and academic research. I am also an occasional FOIA litigant, and am currently engaged in FOIA lawsuits against the Department of State and the Food and Drug Administration. I am writing to express concern about the language of the proposed rule, which, in certain cases, seems violative of not just the spirit but the letter of the law. Specifically:

§ 2.5(d): "The bureau will not honor a request that requires an unreasonably burdensome search or requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material."

This is contrary to law.

The controlling statute, 5 USC §552 clearly states: "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 USC §552 (a)(3)(A)

This proposed regulation creates, without any statutory authority whatsoever, the ability to ignore requests that the agency deems "unreasonably burdensome" or involve a "vast quantity of material." This would make the rule *ultra vires*, and as it exceeds the authority granted to the agency by Congress, it is invalid.

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FOIA presumes that agency documents that do not fall into the exemption or exclusion categories are by presumption available to the public. Imposing an additional condition -- non-vastness -- upends that presumption. It would deny the public the right to inspect the majority of documents produced by the agency; the public would only be granted leave to inspect small slices of the agency's (vast) production. Indeed, reasonably-described FOIA requests (my own included) sometimes lead to a production of many thousands of pages of responsive documents, all of which serve FOIA's core purpose of allowing the public to find out "what the government is up to."

§ 2.14: "The bureau may impose a monthly limit for processing records in response to your request in order to treat FOIA requesters equitably by responding to a greater number of FOIA requests each month."

It is questionable whether there is statutory authority for this. FOIA explicitly allows for expedited processing [5 USC §552 (a)(6)(E)] and for multitrack processing [5 USC §552 (a)(6)(D)]. Nowhere is there any provision to throttle or otherwise fail to process a request as fast as possible once it reaches the top of a processing queue.

Regardless, the main concern is that, in combination with the "vast quantity of material" language described above the agency is clearly signaling its unwillingness to process large requests in a timely manner -- as it is required to do by law. This language merely gives the agency another mechanism to delay fulfilling or thwart entirely this statutory duty.

§ 2.16, §§ 2.18-2.20, § 2.28, § 2.37, § 2.51, §§ 2.57-2.59, § 2.62 : changing "time limit" to "time frame"

While this is seemingly a cosmetic change, it is an unnecessary and misleading one. This section, in fact, describes statutory time limits, and these are described as such in the controlling statute. e.g. "... if the agency has failed to comply with any time limit under paragraph (6)." [5 USC §552 (a)(4)(A)(viii)(I)]

The change in language masks the fact that these are statutory limits, implying instead that they are guidelines. This is deceptive.

It is particularly insidious in § 2.28, when the time limit in question is the requester's rather than the agency's; the use of the term "time frame" may lead to a requester's not understanding that failure to meet the time limit may lead to the waiver of rights to object to the agency's actions.

§ 2.20(a)(2)(iii): removal of the wording "; this ordinarily refers to a breaking news story of general public interest".

This is of concern, because, coupled with a failure to amend the exclusions in (iv), this signals that the agency will no longer consider "a breaking news story of general public interest" to qualify as "the type of information which has particular value that will be lost if not disseminated quickly." If this is not the agency's intent, I suggest the

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following modification instead: “The requested information must be the type of information which has particular value that will be lost if not disseminated quickly, such as a breaking news story of general public interest.”

§ 2.45: In paragraph (a), removing the wording “based on all available information” adding in its place the wording “considering the information you have provided and verifying it as appropriate”.

The shift in verb from “based on” to “considering” leaves open what, precisely, the decision is based upon; the new language implies that the agency’s decision merely takes the provided information into account as part of a broader decision process. If that is not the agency’s intent, I suggest leaving the verb as “based on.” If it *is* the agency’s intent to suggest that there is a broader decision process than previously described by regulation, that additional decision procedure and/or guidelines must be outlined in the rule, as per the controlling authority. (“In order to carry out the provisions of this section, each agency shall promulgate regulations... establishing procedures and guidelines for determining when such fees should be waived or reduced.” [5 USC §552 (a)(4)(A)(i)])

§ 2.48: “The subject of the request must concern discrete, identifiable agency activities, operations, or programs with a connection that is direct and clear, not remote or attenuated.”

This is contrary to law.

The controlling statute simply says that in order to qualify for a fee waiver, disclosure should be “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” [5 USC §552 (a)(4)(A)(iii)]
There is no requirement that the disclosed information concern discrete, identifiable agency activities, operations or programs, or that the connection [between the request and the activities?] be direct and clear rather than remote or attenuated.

Agencies are repositories of a tremendous amount of information whose disclosure is in the public interest that does not fall into this category, and failure to waive fees for such information is contrary to the letter of the law.
As just a single example of such information, one would be hard pressed to explain how e-mails and other records regarding a government official’s landlord could possibly concern “discrete, identifiable agency activities, operations or programs,” but as the Scott Pruitt case clearly shows, such records bear directly upon questions of public corruption, which goes straight to the core of the purpose of FOIA.

§ 2.48: adding the word “ordinarily” before the word “presume”

Prior to the proposed wording change, the rule was clear; in the case where a requestor is “a representative of a news media organization seeking information as part of the news gathering process” the public interest was presumed to outweigh the commercial interest in the information. This change muddies the waters -- it is not at all clear how the agency is going to weigh the commercial interest of a news outlet, and raises the possibility that

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different news agencies will be treated differently based upon their commercial standing. Will nonprofit news agencies such as ProPublica be treated differently from NBC or FOX? If so, this raises significant first-amendment questions. To avoid the significant problems caused by this lack of clarity, I suggest that the agency keep the original wording.

All in all, these changes appear designed to make it harder for the public and the press to obtain documents to which it is entitled by law. In certain cases, the proposed rule is contrary to the law and/or exceeds the authority granted by the law. If the agency promulgates these rules, I strongly believe that the agency will quickly become embroiled in litigation, and will have these rules overturned in court.

Finally, I must take issue with the purported reason for this rule change. The preamble to this proposed rule says that "Exponential increases in requests and litigation have made updates to these regulations a priority." This is incorrect. The number of requests per year -- gleaned from the Department of Interior's annual FOIA reports, along with the FY2018 number of 8350 mentioned in this rulemaking document -- is plotted below. There is no evidence of any exponential curve, and the recent uptick in claims for FY17 and FY18 are not excursions any more extreme than that seen in FY2005. Given that two high officials in Interior -- Secretary Ryan Zinke and EPA head Scott Pruitt -- were dogged by allegations of rampant corruption, it is no wonder that there is such an uptick.

As for lawsuits, there has, indeed, been an increase in litigation (graph below, gleaned from the FOIA Project.) I humbly submit that this increase is due to this agency's attitude that FOIA is an impediment to the function of government rather than the essential expression of the citizenry's right to know what its government is up to. And, frankly, this rule change very much reflects that regrettable attitude.

Sincerely,

/s/
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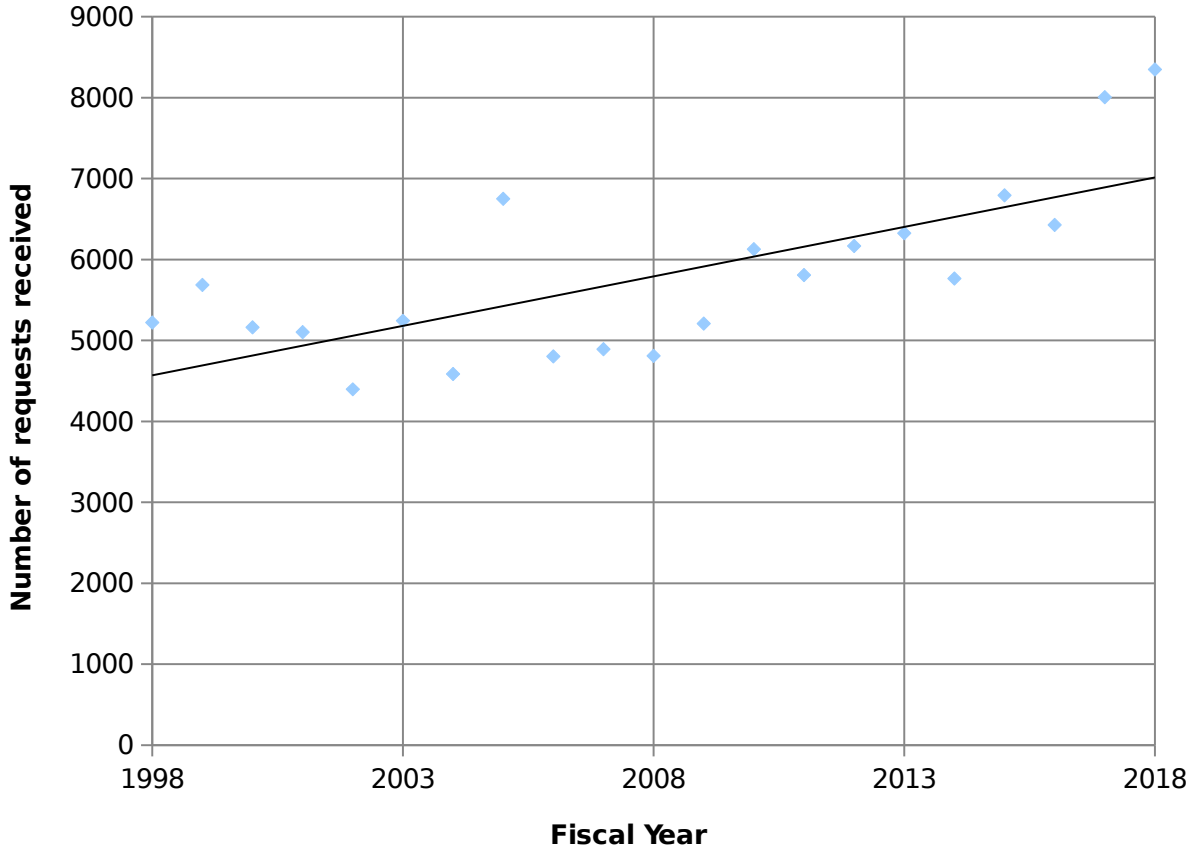

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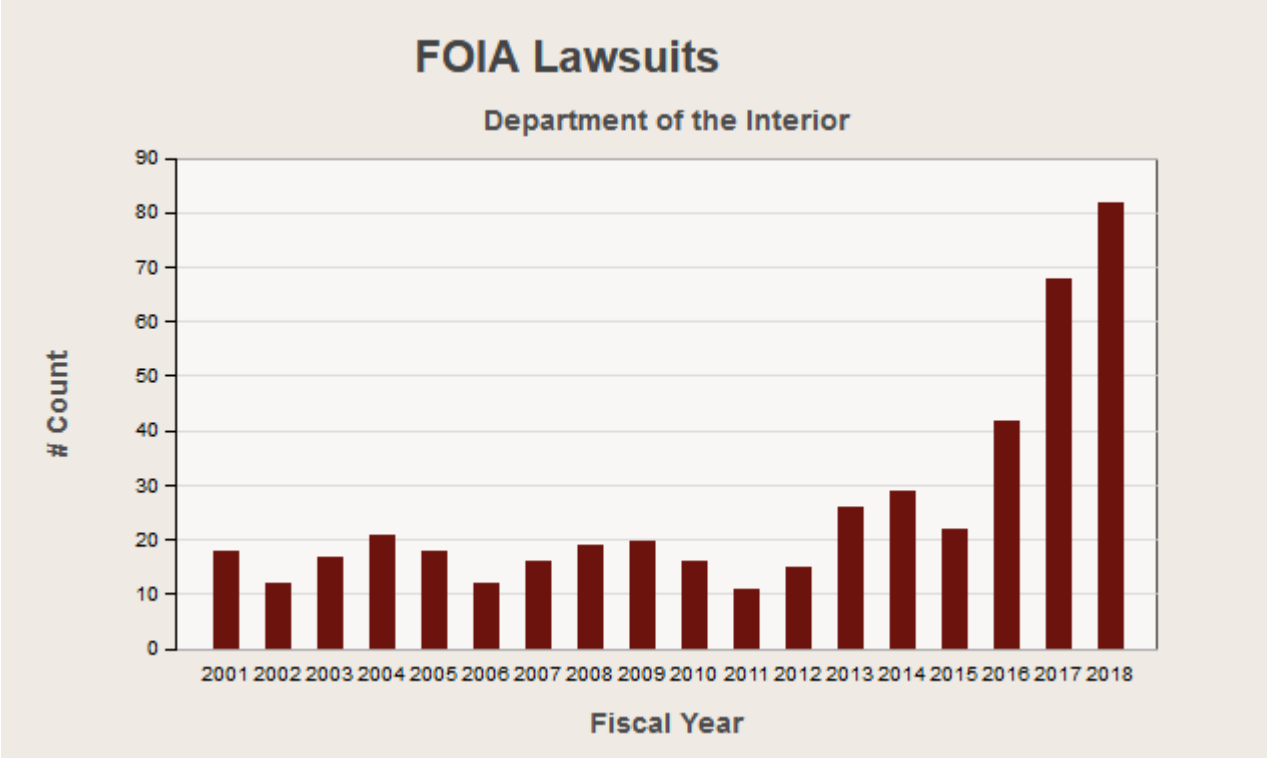

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